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CITATIONS

671564—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 449

HERMAN J. RUBENSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 210–224) have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered August 25, 1945 (R. 225). The petition for a writ of certiorari was filed September 24, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether, in the trial of an attorney for conspiracy to perpetrate a fraud against the United States by aiding an alien in obtaining a visa on the basis of a marriage which the parties intended would shortly be terminated by a divorce, it was error to permit the Government to introduce evidence that petitioner suborned perjury in a divorce proceeding instituted by the alien a month after her entry into this country on a permanent basis.

STATEMENT

Petitioner was tried alone in the District Court for the Southern District of New York on an indictment charging that, in violation of Section 37 of the Criminal Code (18 U. S. C. 88), he and others conspired to violate the immigration laws and to defraud the United States by securing the entry of an alien into the United States by means of concealment of material facts and by false documents (R. 4–8). He was convicted and sentenced to imprisonment for six months (R. 188, 189).[1] On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was affirmed, one judge dissenting (R. 210–225).

The evidence for the Government may be summarized as follows:

Alice Spitz, an alien, was in this country on a temporary visa and wished to remain perma-

[1] Three of the codefendants had pleaded guilty prior to trial (R. 2).

nently (R. 16, 22–23). She agreed to pay one Sandler $200 if he would marry her but not live with her, stating that they would be divorced within six months (R. 24–25, 45, 69, 85). The marriage ceremony was performed in July 1939, and the parties thereafter separated and never lived together as husband and wife (R. 25–26, 41, 69, 83).

In the spring of 1940 Miss Spitz consulted petitioner, an attorney, and told him that she had married an American citizen in order to get a visa (R. 28). Petitioner sent for Sandler and questioned him about his birth place, earnings, etc. (R. 70–71). When Sandler told petitioner that signing papers was no part of his agreement, petitioner replied that it was merely a formality and that the divorce would take place thereafter (R. 71). On a subsequent visit to petitioner's office Sandler signed a document in blank (R. 73, 93). This was a petition for the granting of a visa to Miss Spitz as Sandler's wife (Gov. Ex. 2, R. 16, 190–191), and, in its completed form, it contained a number of false statements as to Sandler's employment and earnings (R. 66–67, 73). One Muller, a relative of Miss Spitz, also signed an affidavit in petitioner's office in which he falsely swore that he had known Sandler for fifteen years (R. 108–109). On the basis of these and other documents, Miss Spitz obtained in Canada a non-quota visa for entry into the United States (R. 16–18, 21, 38).

About a month after she entered this country on a permanent basis, Miss Spitz asked petitioner to secure a divorce for her (R. 39). Petitioner talked with Sandler and suggested that he go to a hotel room with a girl. When Sandler declined to do so, petitioner stated that they would "assume" that Sandler was "caught" with a girl at an address on Reid Avenue near Sandler's residence (R. 75). Sandler testified that he was never served in the divorce action and never found with a woman at the Reid Avenue address (R. 75). One Haimowitz testified that petitioner agreed to pay him $10 if he would serve as a witness in the divorce action (R. 115); that petitioner mailed to him an affidavit of service of the summons and complaint on Sandler which Haimowitz signed before a notary, although he had not in fact made such service (R. 116–117); and that, pursuant to petitioner's instructions, he falsely testified at the hearing in the divorce action that he had observed Sandler with another woman at 103 Reid Avenue in Brooklyn (R. 118–119, 122–127).

At all times when the divorce proceeding was mentioned at the trial below, petitioner's counsel objected to the introduction of evidence thereof on the ground that the divorce action was instituted after the object of the conspiracy charged in the indictment, i. e., the entry of Miss Spitz into the United States, had been accomplished (R. 38–39, 75, 112, 115). He also moved at the

close of the Government's case to strike out all testimony in respect of the divorce (R. 129); he did not more specifically move to strike out the testimony of Haimowitz as distinguished from the other evidence concerning the divorce.

Petitioner took the stand in his own behalf and testified that he understood that Sandler and Miss Spitz were validly married, and that they told him that they planned to go to Cuba together for the purpose of obtaining a visa for Miss Spitz (R. 133–134, 139, 145); that subsequently she told him Sandler's vacation time had passed and that petitioner therefore arranged to have her go to Canada instead of Cuba (R. 145–146); that the document signed by Sandler which was submitted in obtaining the visa was validly executed and contained information supplied by Sandler (R. 134–138); that subsequent to her entry into this country on a permanent basis, Miss Spitz told him that her husband was "going around with women" and asked him to obtain a divorce (R. 149); that he tried to persuade her not to seek a divorce but that she was determined to go ahead (R. 149–150); that he asked Haimowitz to investigate the case and that Haimowitz informed him that Sandler was living at Reid Avenue with another woman (R. 151).

In submitting the case to the jury, the district judge explained the contention of the Government that the marriage was a scheme to defraud the United States (R. 181–182) and called the jury's

attention to the fact that petitioner claimed that the parties had never disclosed to him that the marriage was not an honest one (R. 182). He mentioned that the divorce proceeding was instituted a few weeks after Miss Spitz entered the country on a permanent basis (R. 182–183) and then charged the jury as follows:

> * * * The Government asks you to believe from this that it is a corroborative circumstance of probative value, and whatever may have been the fact, it says that the defendant must have known what was in contemplation from the outset. And then you heard the witness who came in, who had known the defendant for a number of years, who testified that he never as a matter of fact served the defendant Mr. Sandler in the divorce action and that the defendant Rubenstein told him what to say about getting evidence or what he should testify to as to the alleged misconduct of the defendant in the divorce case. You may give that circumstance such weight as you care to give it. So far as this charge is concerned we are not particularly interested in the divorce case. That was a fraud against the State of New York, if it was a fraud. And so, that is the thing you should consider that here were a man and woman who had not lived together long, who had been in the office of the defendant one or more times, and who apparently were cordial and friendly, and yet within three weeks or thereabouts after she comes back

> Mrs. Sandler goes to the defendant and asks for the divorce and says her husband is untrue to her and unfaithful and is philandering with other women and she wants a divorce. It is for you to say whether or not that does indicate that the defendant had reason to believe from the outset that he was engaged in an unlawful enterprise. * * *

On the appeal, petitioner assigned, as one ground of error, the admission of evidence concerning the divorce action (R. 202, 203). All three judges of the court below agreed that it was proper to show that there was a divorce and that petitioner aided in its procurement (R. 212, 215), but there was a division of opinion as to whether it was proper to permit testimony indicating that petitioner had suborned perjury in procuring the divorce (R. 213, 216). The majority of the court below were of the opinion that the admission of such testimony was not error and that, even if it were, the error was harmless (R. 213–214).

ARGUMENT

Petitioner asks this Court to resolve the controversy in the Second Circuit as to the scope of the harmless-error doctrine. Before that question can be reached, however, it must be determined that there was error. Both the dissenting judge below (R. 217, insert) and petitioner (Pet. 7–8) assume that the secondary portion of the majority opinion represents an abandonment of

its earlier position that "we do not think that it was erroneous to admit the evidence" of subornation of perjury in the divorce suit (R. 213). Manifestly, however, that portion of the majority opinion which expresses the view that the error was harmless was merely an alternative argument, of significance only if the initial determination that there was no error is incorrect.

We think that the majority of the court below were clearly correct in holding that the admission of the testimony as to subornation of perjury in the divorce proceeding was not erroneous. The gist of the offense for which petitioner was tried was that he, Miss Spitz, Sandler and others, conspired to defraud the United States by utilizing a marriage not entered into in good faith by Miss Spitz and Sandler as the basis for securing the admission of Miss Spitz into the United States for permanent residence as a nonquota immigrant. 8 U. S. C. 204 includes as a nonquota immigrant "an immigrant who is * * * the wife * * * of a citizen of the United States." And the husband must establish, in a verified petition for the admission of his wife as a nonquota immigrant, that he "is able to and will support the immigrant if necessary to prevent such immigrant from becoming a public charge" and he is required to support his petition by the statements under oath of two responsible citizens who have known him for at least a year. 8 U. S. C. 209.

It is evident that the immigration laws contemplate that a wife is not to be admitted as a nonquota immigrant unless she comes here for the purpose of establishing her home with her American husband in the close relationship which ordinarily attaches to the status of husband and wife.[2] Hence, there can be no doubt that the utilization by the defendants of a marriage which was entered into with no idea of establishing the normal relationship of husband and wife and which it was agreed would be speedily terminated by divorce is not the type of marriage which brings the alien spouse within the provisions of the immigration laws relating to nonquota immigrants.

The crucial issue in this case is whether petitioner was aware of the character of the marriage when he arranged on the basis of it to have Miss Spitz admitted as a nonquota immigrant. It is undisputed that petitioner had no part in the original arrangements for the marriage. But that he knew the character of the marriage at the time he applied for the visa for Miss Spitz is evident from the testimony of Sandler that petitioner told Sandler, when Sand-

[2] The majority below were of the view that the marriage was an invalid one (R. 214–215), but we think that whether it was or was not is unimportant since a valid marriage entered into pursuant to an arrangement like that between Miss Spitz and Sandler would thwart the purpose of the immigration laws equally with an invalid marriage.

ler objected to signing papers, that it would be a formality and "that the divorce would take place right after that" (R. 71). Certainly, however, the Government was not required to stop at this point in the production of evidence bearing on the question of petitioner's knowledge. It was entitled to round out the picture with any other available evidence which would tend to show that petitioner knew that the parties did not intend to live together as husband and wife when he sought the visa. The commencement by petitioner within a month after Miss Spitz's entry for permanent residence of a divorce proceeding occasioned by no legitimate ground which had arisen since the marriage but which had to be supported by a charge of adultery which he could only maintain by procuring perjured testimony, is strongly corroborative, we believe, of Sandler's testimony indicating that petitioner, when he took steps to secure Miss Spitz's entry, knew that the marriage was not an honest one but one which the parties planned to terminate by divorce as speedily as some ground could be manufactured.[3]

[3] That petitioner intended to deny knowledge that the marriage was not an honest one had been indicated by defense counsel's cross-examination of Miss Spitz and Sandler, both of whom were asked whether they had not told petitioner that they were going to Cuba together to apply for the visa (R. 64, 94–95). And, when petitioner took the stand in his own defense, he did disclaim any knowledge of the fraudulent character of the marriage (see p. 5, *supra*).

The difference between the probative force of Sandler's testimony without corroboration and the same testimony supported by the additional proof that petitioner so actively assisted in the divorce that he suborned perjury in order to procure it, seems to us self-evident. The testimony as to the subornation of perjury in the divorce proceeding was not, as petitioner claims (Pet. 8), weakly probative. More than the evidence showing the fact of the divorce, it was evidence strongly tending to establish the most important issue in the case, i. e., petitioner's guilty knowledge of the preconceived plan to terminate the sham marriage by a divorce.[4] If the testimony as to the subornation of perjury was relevant on the question of knowledge, as we submit, it cannot matter that it disclosed that petitioner had added another crime to that which he had already committed. *Moore* v. *United States,* 150 U. S. 57; *Devoe* v. *United States,* 103 F. 2d 584 (C. C. A. 8), certiorari denied, 308 U. S. 571; *Suhay* v. *United States,* 95 F. 2d 890, 894 (C. C. A. 10), certiorari denied, 304 U. S. 580; *Dysart* v. *United States,* 270 Fed. 77 (C. C. A. 5), certiorari denied, 256 U. S. 694.

[4] In his instructions (see pp. 6–7, *supra*), the judge was careful to point out to the jury that they were not to be concerned with the fraud on the New York court, but were to consider the evidence in respect of the divorce only on the question of petitioner's guilty knowledge.

CONCLUSION

There was no error in the admission of the evidence in question and hence the case does not present the question sought to be raised as to the scope of the principle of harmless error. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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NOVEMBER 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945